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No. 90-1930

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

RUBEN COLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 16(1)(A) of the Uniform Code of Military Justice, 10 U.S.C. 816(1)(A), violates the Constitution by permitting a military defendant to be tried by a court-martial panel containing as few as five members.

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OPINIONS BELOW

The order of the Court of Military Appeals, Pet. App. 1a, affirming petitioner's conviction is reported at 32 M.J. 474. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 2a-15a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 21, 1991. The petition for a writ of certiorari was filed on June 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Navy, was tried by a general court-martial at the Naval Station in Mayport, Florida. He was convicted of murder, robbery, and kidnapping, in violation of Articles 118, 122, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 922, and 934. The court-martial sentenced petitioner to confinement for life, a dishonorable discharge, total forfeiture of pay, and reduction to the lowest enlisted pay grade. The convening authority approved the findings and sentence.[1] The Navy-Marine Corps Court of Military Review affirmed on mandatory review. The Court of Military Appeals granted discretionary review and summarily affirmed.

1. On the morning of March 15, 1988, a payday for the crew of the destroyer *USS John Hancock*, Lieutenant Ratish Prasad, the ship's disbursing officer, was missing, and one of the safes in the disbursing office was found unlocked and open.[2] Missing

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[1] A convening authority is a commander authorized to convene courts-martial under Articles 22-24, UCMJ, 10 U.S.C. 822-824, and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States—1984* (*Manual*). The duties of the convening authority include selection and appointment of prospective court-martial panel members (commonly known as "detailing" the members); determination and direction that the accused be brought to trial by the court-martial for the charged offenses (commonly known as "referral" of the charges); and post-trial review of the proceedings to approve the sentence or to grant clemency (commonly known as "action" on the case). See Arts. 25, 34, 60, UCMJ, 10 U.S.C. 825, 834, 860. See also Rules for Courts-Martial 503, 601, 1107.

[2] A disbursing officer is responsible for pay and finances.

from the safe were $94,629 in U.S. currency, 2,575 blank and consecutively numbered U.S. Treasury checks pre-printed with the name *USS John Hancock*, and a U.S. Treasury check payable to a crew member in the amount of $419. A search of the ship led to the discovery of Lieutenant Prasad's body in a seabag locker in the forward part of the ship. He had been bound, gagged, strangled, and shot through the head. Pet. App. 4a-5a.

Suspicion focused on petitioner for several reasons: He was seen leaving the ship carrying a large bag early on the morning of the murder; he unexpectedly requested early separation from the Navy after 15 years of service; he gave erroneous information about his whereabouts at and after the time of the murder; and he rented a safe deposit box under suspicious circumstances that caused a bank official to report the matter. Pet. App. 6a-7a. Petitioner was ultimately convicted of the murder of Lieutenant Prasad.[3]

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[3] The government's primary evidence at trial was obtained as the result of a search of petitioner's apartment, pursuant to his consent, and from a search of petitioner's safe deposit box, pursuant to a warrant issued by a United States Magistrate based upon information derived from police surveillance of petitioner. In petitioner's safe deposit box, the investigating agents found the currency and checks listed in the text; in petitioner's apartment, the agents found a rope and a business card. An expert testified at trial that the rope had the same fiber content as the rope found around Lieutenant Prasad's neck. The business card led to a discovery that petitioner had purchased a .38 caliber pistol and ammunition from a local gun shop. An expert testified at trial that the weapon could have fired the fatal shot, and that the ammunition was similar to the spent bullet found near the victim's body. Pet. App. 8a-14a.

2. a. Pursuant to its authority under Art. I, § 8, Cl. 14, of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," Congress has enacted the Uniform Code of Military Justice, which governs the size, selection process, composition, and voting procedures of courts-martial. Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A), provides that general courts-martial shall consist of at least five members, although any greater number is permissible. Article 25(d)(2) of the Code, 10 U.S.C. 825(d)(2), directs the court-martial convening authority to select for the court-martial panel "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[4] Article 25(c)(1) of the Code, 10 U.S.C. 825(c)(1), allows an enlisted defendant to insist that at least one-third of the court-martial panel be made up of enlisted personnel equal to or senior in rank to the defendant and from a different military unit, unless physical conditions or military exigencies prevent such persons from being assigned to a court-martial panel.

b. In this case, the convening authority detailed 13 prospective panel members to petitioner's court-martial. Tr. 210, 257, 293.[5] The government chal-

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[4] Before the court-martial panel is assembled, the convening authority is free to add, delete, or substitute panel members. Arts. 25, 29, UCMJ, 10 U.S.C. 825, 829.

[5] Seven members were detailed initially. Tr. 210-211. When three of the seven initial members were excused, four additional servicemembers were detailed. Tr. 256-257. Following challenges to those four members, two additional servicemembers were detailed. Tr. 290-293. After one of those members

lenged three prospective members for cause: two because they would be unable to give meaningful consideration to imposition of the death penalty, Tr. 290-291, and one because he had already formed an opinion that petitioner was guilty based upon newspaper accounts of the crime, Tr. 307, 313. The defense challenged one prospective member for cause because of his extensive exposure to media reports of the facts of the crime. Tr. 253, 256. The government peremptorily challenged two prospective panel members. Tr. 256, 292. The defense also struck two prospective panel members, Tr. 256, 292.[6] Upon completion of all the challenges, a quorum of five panel members remained. They were empaneled without objection by the defense. Tr. 313-314.

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was challenged, a quorum of five members remained. Tr. 313-314.

All the panel members were officers. Tr. 210, 257, 293. Petitioner did not request that the court-martial membership be comprised of at least one-third enlisted persons, as was his right under Article 25(c)(1), UCMJ, 10 U.S.C. 825(c)(1).

[6] The government and defense are each entitled to one peremptory challenge as a matter of right. Art. 41, UCMJ, 10 U.S.C. 841. Military trial judges, however, have the discretion to grant each side an additional peremptory challenge if the convening authority adds new members to the court-martial panel. *United States* v. *Carter*, 25 M.J. 471, 476 (C.M.A. 1988). In this case, each side was granted two additional peremptory challenges because the convening authority added new members on two occasions, when the number of prospective panel members fell below the quorum of five required by Article 16, UCMJ, 10 U.S.C. 816, due to the exercise of challenges by both sides. Tr. 256-257, 292-293.

ARGUMENT

In *Ballew* v. *Georgia*, 435 U.S. 223 (1978), this Court held that the Sixth and Fourteenth Amendments require that at least six persons serve on the jury in serious state criminal cases. Relying on *Ballew*, petitioner argues that his conviction by a five-member court-martial panel violates the Due Process Clause of the Fifth Amendment. That claim does not warrant review by this Court.[7]

1. Petitioner did not properly preserve his claim, for several reasons. Petitioner did not object before or at trial to having only five members serve on the court-martial panel in his case, nor did petitioner move to have more than five members empaneled. Accordingly, petitioner has waived his claim. See Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984 (Manual)* (requiring defendant to raise nonjurisdictional claims on pain of waiver). Moreover, petitioner did not raise his claim on appeal either in the court of military review or in the Court of Military Appeals. See Supp. to Pet. for Grant of Review 2-3 (Dec. 19, 1990) (questions presented to Court of Military Appeals); Pet. App. 3a-5a n.2 (questions presented to the court of military review). Under these circumstances, petitioner has not preserved his claim for review in this Court.

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[7] This Court has previously denied certiorari in several other cases presenting the identical or substantially the same question. *Viola* v. *United States*, cert. denied, 490 U.S. 1020 (1989); *Hargrove* v. *United States*, cert. denied, 488 U.S. 826 (1988); *Johnson* v. *United States*, cert. denied, 488 U.S. 823 (1988); *Mason* v. *United States*, cert. denied, 484 U.S. 912 (1987); *Delacruz* v. *United States*, cert. denied, 481 U.S. 1052 (1987); *Dodson* v. *United States*, cert. denied, 479 U.S. 1006 (1986); *Garwood* v. *United States*, cert. denied, 474 U.S. 1005 (1985); *Hutchinson* v. *United States*, cert. denied, 469 U.S. 981 (1984).

See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[8]

2. There is no conflict among the circuits on the question presented by petitioner. The military courts have consistently rejected the claim that the court-martial system established by Congress is invalid under *Ballew* v. *Georgia*, *supra*, on the ground that a servicemember may be convicted by a court-martial panel that has fewer than 12 members. *E.g.*, *United States* v. *Mason*, 24 M.J. 127, 128 & n.* (C.M.A.), cert. denied, 484 U.S. 912 (1987); *United States* v *Hutchinson*, 17 M.J. 156, 156-157, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984); see *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986); *United States* v. *Kemp*, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973) (the Sixth Amendment cross-section requirement is inapplicable to court-

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[8] The statutes authorizing this Court to review by a writ of certiorari the judgments of the Court of Military Appeals, Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1) and 28 U.S.C. 1259(3), restrict this Court's certiorari jurisdiction to "decisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." Article 67(d), UCMJ, 10 U.S.C. 867(d), provides that the Court of Military Appeals has the authority to limit its decision in any case to less than all of the questions presented by an appellant. Because petitioner did not raise this claim in the Court of Military Appeals, it is not clear that that court rendered a "decision" on the question presented to this Court in the petition for certiorari within the meaning of Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1). For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

martial panels). The decisions of that court are consistent with the decision of the only federal court of appeals to consider this question in light of this Court's decision in *Ballew*. *Mendrano* v. *Smith*, 797 F.2d 1538, 1544-1547 (10th Cir. 1986).

3. In any event, there is no merit to petitioner's claim. The statute governing the number of court-martial panel members does not offend the Fifth or Sixth Amendments to the Constitution.

a. Petitioner seeks to impose on courts-martial the same requirements that Art. III, § 2, Cl. 3, and the Sixth Amendment impose on juries in civilian cases. It is well settled, however, that the right to a jury trial guaranteed by those provisions does not apply to court-martial proceedings. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858).[9] The Fifth Amendment specifically exempts "cases arising in the land

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[9] See also *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States*, 483 U.S. 435 (1987); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921); *Mendrano* v. *Smith*, 797 F.2d 1538, 1544 (10th Cir. 1986); *King* v. *Moseley*, 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961); *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986); *United States* v. *Hutchinson*, 17 M.J. 156-157, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984). See *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate the Sixth Amendment). See generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Article III or Sixth Amendment right to a trial by a petit jury, he also had no right under those provisions to a jury composed of at least six persons.

b. Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States*, 483 U.S. at 447. See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the composition of a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action," *Whelchel* v. *McDonald*, 340 U.S.

122, 127 (1950) (citations omitted); see also, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981) (the decisions of Congress are entitled to particular deference when they involve "Congress's authority over national defense and military affairs"), but also because the practices at issue have been carried forward from the earliest days of our nation. Cf. *Solorio* v. *United States*, 483 U.S. at 442-445.

The nation's first military law was the American Articles of War of 1776. 1 & 2 W. Winthrop, *Military Law and Precedents* 47, App. 961-971 (2d ed. 1920). Section 14, Art. I, provided that at least 13 officers would serve on general courts-martial (*i.e.*, a president and 12 members). 5 J. Continental Cong. 800 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra*, App. 967. In 1782, Congress substantially adopted the English practice for naval courts-martial of detailing five officers to a court-martial in a capital case and three in a noncapital case. 22 J. Continental Cong. 325 (G. Hunt ed. 1914). Four years later, when large numbers of desertions and an understaffing of officers had become a particularly acute problem for commanders at frontier outposts, Congress amended the American Articles of War to permit a quorum of five officers at general courts-martial and three officers at regimental courts-martial when 13 members could not be detailed "without manifest injury to the service." 30 J. Continental Cong. 145, 316 (J. Fitzpatrick ed. 1934); 1 & 2 W. Winthrop, *supra*, at 22-23, App. 972; Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363, 384-385 n.118 (1972). That language was merely advisory to the officer responsible for appointing the members of a court-martial, however, and his decision to select fewer than 13 members was both lawful and conclusive.

Martin v. *Mott*, 25 U.S. (12 Wheat.) 19, 34-35 (1827). See also *Bishop* v. *United States*, 197 U.S. 334, 339-340 (1905); *Mullan* v. *United States*, 140 U.S. 240, 245 (1891) (convening officer's determination that trial by members junior in rank to the accused could not be avoided was proper).

Congress endorsed that practice throughout the nineteenth century and the early part of the twentieth century when revising the Articles of War. 1 & 2 W. Winthrop, *supra*, at 77, 159; American Articles of War of 1806, ch. 20, Art. 64, 2 Stat. 367, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 981-982; American Articles of War of 1874, Art. 75, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 992; American Articles of War of 1916, ch. 418, Art. 5, 39 Stat. 651. In the aftermath of World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice. In so doing, Congress retained the requirement of a quorum of five members of general courts-martial, as well as the convening authority's discretion to detail a greater number of panel members, the system that exists today. Art. 16, UCMJ, 10 U.S.C. 816.

In 1984, Congress amended the UCMJ to coincide with proposed changes in the *Manual for Courts-Martial*. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. Concurrently, the President, acting pursuant to his rulemaking authority, promulgated the current version of the *Manual*. In 1985, Congress enacted additional changes to the UCMJ, including the addition of Article 106a, UCMJ, 10 U.S.C. 906a, an espionage statute that authorizes the imposition of capital punishment. That year, the President modified the *Manual* to limit the imposition of the death penalty to those cases in which the court-martial panel members unanimously find the defen-

dant guilty of an offense for which Congress has authorized the death penalty, and then only if the court finds at least one enumerated aggravating factor. Rule 1004, *Manual*; Exec. Order No. 12,550, 3 C.F.R. 192 (1986 comp.). In so doing, neither Congress nor the President required that a court-martial panel consist of 12 members. In sum, it is clear that the five-member court-martial panel of Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A), represents the longstanding and considered judgment of Congress and the President on the proper balance to be struck between the rights of an individual serviceman and the special needs of the armed forces.

That judgment is a reasonable one. Military society is separate and distinct from civilian society. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 300-304 (1983). The essential mission of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). The permissible number of court-martial panel members dates back to 1782 and was chosen in order to minimize interference with the operational readiness of military forces. See Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363, 384-385 n.118 (1972). Considerations of operational readiness are no less valid today. Some cases will be tried at small, remote outposts, aboard ships at sea, or in a combat zone in a time of war, where the pool of available panel members is small and when their availability to perform military duties is critical.

To the extent that the five-person provision may favor the prosecution, other aspects of the military justice system favor the defendant more than is typically the case in civilian systems. As a safeguard

against an inaccurate verdict by a court-martial panel, the military courts require the prosecution independently to prove the defendant's guilt before a court of military review. The standard of review applied by a court of military review to determine whether the evidence is sufficient to support the defendant's conviction substantially differs from, and is more generous to military defendants than, the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether it believes that the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). By contrast, a court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate findings that the accused is guilty, before the findings may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[10]

In addition to the more exacting standards of appellate review, the military defendant enjoys greater

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[10] A court of military review may affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). Although nothing in the text of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence, see *Jackson* v. *Taylor*, 353 U.S. 569, 577 & n.8 (1957), the military courts have read that standard into the Act. *E.g.*, *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977).

rights than his civilian counterpart at the pretrial and post-trial stages of the proceedings. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. That procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a). After trial, the convening authority receives a report of the trial, and he may disapprove findings of guilt or reduce the sentence as a matter of clemency or as a prerogative of command. Art. 60, UCMJ, 10 U.S.C. 860. To assist the convening authority, the accused has the right to submit legal arguments and other matters with respect to the findings and sentence. *Ibid.* See generally *United States* v. *Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970). In light of these special protections against the risk of inaccurate verdicts in the military justice system, petitioner has not made the "extraordinarily weighty" case necessary to overcome the longstanding congressional judgment that the court-martial system satisfies due process requirements. *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).

3. Petitioner argues that the verdict of a five-member court-martial panel is inherently unreliable. Pet. 3-4. To support that claim, petitioner relies on the studies cited in the lead opinion in *Ballew* v. *Georgia*, 435 U.S. 231-243 (opinion of Blackmun, J.), which relied heavily on empirical studies of the group dynamics of civilian juries. There are no comparable studies of the dynamics of court-martial

panels, however, and the studies of the dynamics of civilian juries cannot automatically be applied to the military justice system. The reason is that the data underlying those studies were compiled in the civilian community from juries that are randomly selected to represent a cross-section of the community. Court-martial panels, however, are not selected in that manner. Instead, under Article 25 of the UCMJ, 10 U.S.C. 825, they are deliberately chosen on the basis of who is best qualified to sit as a panel member. The data and studies discussed in *Ballew* are therefore inapposite to trials by court-martial. *United States* v. *Guilford*, 8 M.J. 598, 601-602 & n.4 (A.C.M.R. 1979), petition for review denied, 8 M.J. 242 (C.M.A. 1980); *United States* v. *Wolff*, 5 M.J. 923, 925 (N.C.M.R. 1978), petition for review denied, 6 M.J. 305 (C.M.A. 1979) (and authorities cited therein). Given the special deference due to Congress's judgments in this area, the question whether studies of the type discussed in *Ballew* justify a change in the UCMJ should be left to Congress.

4. Petitioner suggests that this Court's 1987 decision in *Solorio* v. *United States*, *supra*, requires a different result. He argues that the number of panel members may have been permissible before *Solorio*, but is no longer justified now that this Court has eliminated the service-connection restriction on court-martial jurisdiction. That argument is misdirected.

Solorio did not abolish the service-connection requirement for court-martial jurisdiction. Rather, it reaffirmed the traditional principle that an offense is sufficiently service connected for the purpose of court-martial jurisdiction if the accused is a servicemember when the offense is committed and the trial is held. *Solorio* simply restored court-martial jurisdiction to

a category of cases excluded from coverage during the 18 years following *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), *i.e.*, certain cases in which the offenses were committed by servicemembers off the premises of military installations. The statutory requirements for the number of court-martial members were adopted by Congress prior to this Court's decision in *O'Callahan*, not during the period between *O'Callahan* and *Solorio*. Moreover, there is no historical or logical relationship between the sort of service-connection restriction applied in *O'Callahan* and the statute at issue here. Accordingly, the decision in *Solorio* has no effect on the validity of Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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